Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	
Enhancement Act and Modernization of the	)	WT Docket No. 05-211
Commission's Competitive Bidding Rules and	)	
Procedures	)	
	)	

To: The Commission

REPLY COMMENTS OF COOK INLET REGION, INC.

The record in this proceeding raises serious questions about the advisability and efficacy of reforming the designated entity program as proposed in the *Further Notice of Proposed Rulemaking*.[1] The comments filed in response to the questions raised in the *Further Notice* demonstrate that there is no consensus as to how that reform should be designed. Any hasty decision to change the Commission's rules in advance of the upcoming Auction No. 66 could, at a minimum, have significant unintended consequences for potential bidders. In addition, these reforms could permanently and significantly reduce or eliminate the participation by designated entities in Auction No. 66 or any future auctions, an outcome directly contrary to congressional mandate and the Commission's intent. Cook Inlet Region, Inc. ("Cook Inlet") respectfully urges the Commission to consider more carefully whether the reforms proposed by Council Tree Communications, Inc. ("Council Tree") and endorsed by the Commission in the

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[1] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Further Notice of Proposed Rulemaking*, WT Docket No. 05-211, FCC 06-8 (released Feb. 3, 2006) ("*Further Notice*").

Further Notice serve the public interest, or whether they serve the interests of a few particular carriers by unfairly discriminating against certain relationships with large wireless service providers.

The designated entity program has been and can continue to be an effective way to ensure that small businesses participate in spectrum auctions for wireless communications licenses. The Commission already has the fully-developed rubric of the "controlling interest" standard which can be used to evaluate and enforce compliance with its designated entity requirements. There has been no allegation that this standard is defective. There has been no identification of any specific problem with the existing designated entity program or abuse of the Commission's rules. Without identifying clearly the need for reform, the Commission cannot hope to evaluate clearly and fairly the risks and benefits of the rule changes it proposes to adopt.

The Commission should not adopt piecemeal changes to the designated entity rules on an *ad hoc* basis. Rather, the Commission should consider ways in which it can develop the existing analysis it applies to designated entity applicants using the "controlling interest" standard. Rather than trumping the "controlling interest" standard with an absolute bar on partnerships with a certain class of carrier, the Commission should consider more generally whether additional, neutral factors should be considered when it evaluates designated entity applicants.

I. THERE IS NO CONSENSUS SUPPORTING THE PROPOSAL IN THE *FURTHER NOTICE* – THE COMMENTS RECEIVED BY THE COMMISSION RECOMMEND A WIDE VARIETY OF INCONSISTENT APPROACHES TO DESIGNATED ENTITY REFORM.

The comments filed in response to the *Further Notice* show that support for the proposal is inconsistent. Several parties objected wholesale to the rule changes suggested in the

Further Notice.[2] Even the alleged supporters of the *Further Notice* and Council Tree's proposal for designated entity reform cannot agree on what those reforms should be. While a number of parties expressed general support for the *Further Notice*, none of these parties actually advocate consistent modifications to the designated entity rules. For example, some parties support the Commission's proposal to restrict designated entity investment by large wireless carriers but oppose extending the restriction to other large companies.[3] Others support restricting investment by other classes of telecommunications companies[4] or restricting investment by any large company.[5] While some parties support the $5 billion revenue test,[6] some suggest it should be reduced[7] and others support raising it.[8] Some parties suggest there should be restrictions only on

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[2] *See, e.g.*, Comments of Cook Inlet; Comments of Verizon Wireless; Comments of the National Telecommunications Cooperative Association; Comments of T-Mobile USA, Inc.; Comments of CTIA – The Wireless Association ("CTIA"); *see also* Comments of Wirefree Partners III, LLC (proposing alternative reforms).

[3] *See, e.g.*, Comments of the Minority Media and Telecommunications Council at 10-11; Comments of Antares, Inc. at 4; Comments of STX Wireless, LLC at 2; Comments of US Wirefree at 2; Comments of MobiPcs at 2.

[4] *See, e.g.*, Comments of the Rural Telecommunications Group, Inc. ("RTG") and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 3 (supporting restrictions on Tier II carriers' investment in designated entities); Joint Comments of Columbia Capital LLC, MC Venture Partners and TA Associates, Inc. at 5 (supporting restriction on partnership with any large telecommunications company); Comments of Centennial Communications Corp. at 7 (supporting restrictions on large companies with significant interests in telecommunications).

[5] *See, e.g.*, Comments of Dobson Communications Corporation at 2-3.

[6] *See, e.g.*, Comments of MetroPCS Communications, Inc. at 9-10.

[7] *See, e.g.*, Comments of Wireless Broadband Service Providers Association at 5 (proposing $1 billion rather than $5 billion threshold).

[8] *See, e.g.*, Comments of Carroll Wireless, L.P. at 6 ("the proposed five million [*sic*] dollar cap appears lower than appropriate"); Comments of Aloha Partners, L.P. at 4.

financial relationships,[9] while others believe no relationship at all should be permitted with these carriers.[10] And the parties filing comments support an array of additional reforms not even considered in the *Further Notice*, such as reinstating set-asides for designated entities,[11] providing certain safe harbors for designated entities,[12] creating an expedited complaint process to allow third parties to challenge the compliance by certain designated entities,[13] or even completely overhauling the entire competitive bidding process.[14] All in all, the comments raise a complex host of issues that should receive the benefit of careful and thoughtful consideration.

Certainly, it would be unusual for all interested parties to agree on the particulars of any reform proposed by the Commission. The difficulty here is that the factual record regarding past violations and abuse is woefully underdeveloped, making it difficult for any interested party to reach any real conclusion regarding the efficacy of proposed reform.[15] Because the Commission has failed to identify the specific problem the *Further Notice* was designed to address, there is simply no way that interested third parties can fully evaluate or even

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[9] *See, e.g.*, Comments of John Staurulakis, Inc. ("JSI") at 3 (suggesting that a material relationship exists only where an incumbent wireless carrier provides a material portion of the total capitalization of the applicant).

[10] *See, e.g.*, Comments of Leap Wireless International, Inc. at 15 (the Commission should prohibit any material financial or operational relationship); Comments of Poplar Associates, LLC at 3 (definition of "material relationship" should be broad).

[11] *See* Comments of Poplar Associates, LLC at 2; Comments of Wireless Broadband Service Providers Association at 7-8.

[12] *See* Comments of NTCH, Inc. at 2, 6.

[13] *See* Comments of National Hispanic Media Coalition et al. at 19.

[14] *See* Comments of National Hispanic Media Coalition et al., Declaration of Dr. Gregory Rose at 30.

[15] *See* Comments of National Hispanic Media Coalition et al. at 3, 9 ("The extremely limited comment period the Commission has afforded for response to the [*Further Notice*] makes it effectively impossible to answer this complex question.").

agree on whether these reforms will work.[16] The factual record in this proceeding continues to be incomplete in that no clear abuse or problem has been identified so that the reform cannot be appropriately tailored to end that abuse or solve that problem. The foundational factual record on which the need for reforms proposed in the *Further Notice* is based remains questionable at best. As a result, the Commission risks implementing piecemeal reform on an *ad hoc* basis, rather than taking a reasoned and comprehensive approach to modifying the designated entity rules and maintaining the program.

Cook Inlet has recommended that the Commission reexamine the "controlling interest" standard for this very reason. The Commission should evaluate whether additional, neutral factors will help to evaluate who has *de facto* control over a designated entity applicant. A neutral factor, rather than a *per se* restriction against partnerships with a particular class of carrier, will preserve the flexibility inherent in the "controlling interest" standard and help to ensure that the designated entity can continue to flourish in the face of changing market conditions. One appropriate factor might be the extent of the financial contribution the designated entity makes to the licensee applicant as compared to the non-controlling financial partner. In addition, the Commission could implement procedures to ensure ongoing compliance with its designated entity rules, even after licenses are awarded. Rule changes along these lines could go a long way toward preserving the integrity of the designated entity program without unfairly limiting a designated entity's access to partners with necessary capital or technical

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[16] *See Fox Television Stations, Inc. v. FCC*, 280 F3d 1027, 1044 (2002) (concluding that two justifications for the proposed rule change did not show the rule was necessary in the public interest and that the third justification was based on minimal analysis of the state of competition in the television industry).

expertise, or improperly assuming that certain investors are more likely to abuse the Commission's rules than others.

II. THE COMMISSION'S PROPOSED RULE IS ARBITRARY AND DISCRIMINATORY.

There is no evidence in the record to suggest that large national wireless carriers are the source of any problems with the designated entity program. As Verizon Wireless correctly points out, "[t]he fact that a [designated entity] is partnering with a large wireless carrier says nothing about whether the [designated entity] is bona fide or not – any more than a [designated entity] who happens to partner with [a] smaller entity will be bona fide."[17] It is not the identity of the partner that is critical; rather, it is the extent of control that partner can and does exercise over the applicant that is relevant. A management agreement that gives the manager impermissible levels of control over the licensee's day-to-day operations, prices and services, or other factors should be problematic under the Commission's rules regardless of the identity of the partner. The Commission has failed to provide any adequate justification for treating large, incumbent wireless carriers differently from any other wireless carrier or even any other large company.[18]

While a number of the parties who filed argue that concentration in the wireless market justifies these reforms, the fact remains that market concentration occurs independent of whether the designated entity program exists. If the Commission is truly concerned about concentration of spectrum in the hands of a few large companies, the Commission should adopt

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[17] Comments of Verizon Wireless at 5. *See also id.* at ii; Comments of CTIA at 4.

[18] *See* Comments of CTIA at 5 ("Either the [designated entity] rules are systemically flawed, in which case the FCC should be considering revisions to the [designated entity] rules applicable to all investors, or the rules are effective, in which case differential treatment of large incumbent carriers must be separately justified.").

reforms specifically tailored to eliminate concentration, whether by reintroducing spectrum caps or requiring divestitures as a condition to merger approvals. It is disingenuous at best to suggest reforming the designated entity program will have any impact on market consolidation.[19] If the Commission is truly seeking to address issues of competition and consolidation, it should do so directly, not indirectly through the designated entity program. Bona fide designated entities like Cook Inlet should not be penalized as part of this process.

The proposal in the *Further Notice* was advanced by a single designated entity that stands to benefit significantly if designated entity partnerships with large wireless carriers are prohibited. The Commission should not endorse this blatant attempt to dominate the designated entity program. It is not surprising that Leap Wireless International, Inc., United States Cellular Corporation, SunCom Wireless, Inc., and Centennial Communications Corp. all have voiced support for the proposal outlined in the *Further Notice* because they stand to benefit directly if these reforms are adopted. According to the information provided by Council Tree, these commercial mobile service providers are the next tier of large operators in the country.[20] By eliminating the ability of the five largest wireless carriers to partner with qualified designated entities, these carriers become the next most attractive partners for small businesses who want to break in to the wireless telecommunications industry. Indeed, small businesses like Council

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[19] *Cf.* Comments of Antares, Inc. at 3 ("[C]onsolidation has occurred for a variety of reasons, including the elimination of the FCC's former cellular cross-interest and spectrum cap rules."); Comments of Aloha Partners, L.P. ("Concentration is a fact of life in the industry...."). Council Tree essentially concedes this point in its comments when it notes that "the Commission's new rule will not prohibit national wireless service providers from acquiring Commission licenses directly. That could be done only with an eligibility limitation or a spectrum cap." Comments of Council Tree at 32.

[20] *See* Comments of Council Tree at 18.

Tree, who have partnered with mid-sized companies like Leap in the past,[21] will be in the best position to bid on and win spectrum in Auction No. 66 because they will have the financial and technical resources of a significant incumbent carrier backing them. Yet there has been no explanation of how these mid-sized carriers are any less incentivized to take advantage of their designated entity partners than the largest national carriers. There is no basis on which to distinguish the ability of a large carrier to exercise impermissible levels of control over the licenses won by these designated entities from the ability of a mid-sized carrier – or any other partner – to exercise *de facto* control over the licenses won by these designated entities. No facts have been introduced in the record that justify discriminating against these large carriers.[22] The Commission's proposal to exclude only these large carriers from future designated entity partnerships is simply arbitrary and discriminatory – and if the Commission moves forward to adopt this restriction, it could be successfully challenged on this basis.

III. HASTY REFORM COULD HAVE DETRIMENTAL UNINTENDED CONSEQUENCES.

In its initial comments, Cook Inlet raised its concern that a broadly drafted prohibition on designated entities who have a "material relationship" with a large wireless carrier could have unintended consequences. Specifically, Cook Inlet raised the concern that this restriction could create retroactive penalties against otherwise qualified designated entities – like Cook Inlet – who currently have or in the past have had a relationship with a large wireless

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[21] *See* Application of Alaska Native Broadband 1 License, LLC at Exhibit C, File No. 0002069129.

[22] *Cf. Fox Television Stations* at 1043 ("In sum, we agree with the networks that the Commission has adduced not a single valid reason to believe the [rule] is necessary in the public interest, either to safeguard competition or to enhance diversity."); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F3d 148, 163-64 (2002) (discussing "deficiency" of factual record).

carrier.[23] Other parties raised similar concerns regarding the potential scope of reform and the unintended impact it could have. For example, any change to the designated entity rules as proposed by the Commission in the *Further Notice* could disqualify rural telecommunications carriers for whom certain contractual arrangements with the five largest wireless carriers are critical for their business.[24] Similarly, resale and roaming agreements should not disqualify small businesses who wish to participate in future auctions as designated entities.[25] The Commission should take care that any designated entity reform it adopts is narrowly targeted and carefully crafted to avoid any of these, or any other, unintended consequences that could destroy the designated entity program. Of course, in order to narrowly tailor its proposed reform, the Commission must first identify with specificity the goal of the reform, something the Commission has failed to do in the *Further Notice.*

By rushing quickly to reform the designated entity program in advance of Auction No. 66, the Commission runs the risk that its new rules will have broader, negative consequences that will cripple the designated entity program. This program has been successful in encouraging the participation by small businesses in developing spectrum-based services. It is premature to adopt a sweeping rule change such as the one proposed in the *Further Notice*. There has been no showing that the existing "controlling interest" standard should be so carelessly abandoned. Not until any failures of the designated entity rules are clearly identified can the Commission hope to address those failures through rational reform.

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[23] *See* Comments of Cook Inlet at 17-18.

[24] *See* Comments of JSI at 3.

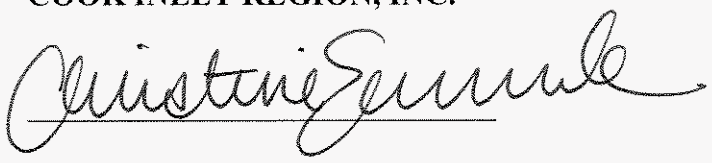
[25] *See* Comments of the RTG and OPATSCO at 4-5.

IV. CONCLUSION.

Even the alleged supporters of the *Further Notice* cannot agree on the appropriate steps that should be taken to reform the designated entity program. By acting quickly in the face of upcoming Auction No. 66 and with imperfect information about the scope and nature of abuses of the designated entity program or the best approach to curb those abuses, the Commission has proposed an *ad hoc* approach to designated entity reform that risks broad detrimental consequences and, ultimately, the demise of the program itself. In contrast, by building on the existing "controlling interest" standard, the Commission could enhance its decades of experience evaluating contractual and other relationships between licensees and those companies that provide technical and financial support. Abandoning this standard without justification will, at a minimum, increase uncertainty among potential auction participants which can only serve to reduce the number of designated entity applicants who bid on licenses in Auction No. 66 and future auctions. The Commission should reconsider whether the approach outlined in the *Further Notice* is the right one.

Respectfully submitted,

COOK INLET REGION, INC.



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March 3, 2006